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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ELIZABETH D. LAPORTE, MAGISTRATE

ORACLE CORPORATION,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 07-1658
)	
SAP AG, et al,)	
)	San Francisco, California
Defendants.)	Tuesday
)	August 4, 2009
)	2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

AUGUST 4, 2009

2:06 p.m.

THE CLERK: Calling Civil 07-1658, Oracle Corporation versus SAP AG, et al.

Counsel, please state your appearances for the record.

MR. HOWARD: Good afternoon, your Honor. Geoff Howard for Oracle.

With me, Zach Alinder, John Polito and Holly House. And Jennifer Boss may arrive mid-proceeding.

MR. COWAN: Good afternoon, your Honor. Scott Cowan for defendants. With me is Jackie Lee and Heather Fugitt, also associates from our office, as well as a summer associate, Dara Lettinson, is here today as well.

THE COURT: There are still a few summer associates?

MR. COWAN: Just a few. We are on our last weeks.

THE COURT: All right. Well, go ahead. I know there are some things you want to present to me I think. I'm not sure which one of you. I can't remember.

MR. COWAN: Your Honor, in terms of a formal presentation, I don't think -- we hadn't intended on doing any kind of dog and pony, if you will. If it aids any questions you may have or any analysis you may do during the

1 hearing, we are prepared to do that.

2 There may be a couple points where it makes sense,
3 but if the Court has questions regarding the papers or would
4 like the parties to present on the motions, we can continue
5 to --

6 **THE COURT:** I know you brought some equipment in.
7 I think you were going to do some kind of demonstration, or
8 not?

9 **MR. COWAN:** I'm prepared to do that, depending what
10 the Court's questions are with respect to the SAS system, for
11 example.

12 I have a PowerPoint with respect to some of the
13 download issues. I certainly could go straight into that.

14 I know the Court's time is limited. I didn't want
15 to go through all that if you don't have questions for it.

16 **MR. HOWARD:** And we just filed ours, your Honor,
17 because we didn't know what they were going to do and we
18 wanted to have the ability to say something in response.

19 **THE COURT:** Okay. Well, I have to say, despite,
20 you know, lots and lots of paper, I find it very difficult to
21 tell who is right on these questions. And, you know, maybe
22 that's -- I would like to think that's not a statement about
23 me, but maybe it is a statement about the system at this
24 point.

25 You know, I will give you some thoughts, but, yes,

1 certainly I do have questions and I believe it's difficult
2 for a judge to judge.

3 For on 13, interrogatory 13, I would agree that
4 it's limited to the downloads referred to in the answer;
5 i.e., the downloads beyond those as set forth in the answer.
6 It's not, you know, where did they come from and things like
7 that, but even as so interpreted, that still leaves the
8 question, you know, is, rule -- I don't think including but
9 not limited to broadens it beyond that.

10 But that still leaves the question of, you know, is
11 Rule 33(d) the appropriate approach? Is it more burdensome
12 on one side or the other, or not?

13 Here is a very simple question. What is an ESU?

14 **MR. HOWARD:** An ESU is a -- one of the support
15 files that is packaged up by Oracle and sent out to customers
16 that provides update information, has code within it. It has
17 other objects within it, but it's one of these downloadable
18 support patch files that gets sent out that customers then
19 apply to their underlying software.

20 **MR. COWAN:** And, your Honor, that is actually one
21 thing I do have some graphics on that may help the Court
22 understand what an ESU is.

23 You may recall, the parties originally did a bit of
24 a dog and pony, as I referenced earlier, back in May of 2008.
25 We have some of those same slides, I think, back then

1 probably then didn't make a lot of sense both to the Court
2 and to the parties in some ways, because we certainly learned
3 a lot more since then as well.

4 But if you have time now, I've got a PowerPoint
5 presentation, but I also have a little booklet that you can
6 follow along with the pages numbers that may help.

7 **THE COURT:** Probably so. So the extent that the
8 defendant is saying the download request forms, which are
9 part of response to 10, would -- interrogatory 10, would also
10 apply to 13, I'm not really sure what -- you know, how the
11 download request forms do or don't -- to what extent they do
12 or don't cover the answer to what material beyond those
13 licensed to a particular customer may have been downloaded.

14 In other words, it sounds to me as if a download
15 request form has some of the information, but whether it has
16 all of them, I have no idea really.

17 Then the defendants then raise the issue, Well, we
18 can't provide the level of detail you ask for, exactly which
19 downloads were beyond what the customers said they were
20 entitled to without product mapping information. I don't
21 know if I understand that whole issue. And the plaintiff, as
22 I saw it, didn't -- I might have missed it, but didn't seem
23 to really respond to that.

24 If it's needed and no -- and neither the plaintiff
25 can't or won't, I don't know which, give it to the

1 defendants, then that does hobble the defendants apparently.

2 Now, the plaintiffs raise a good point, or a
3 seemingly good point. What information do defendants have --
4 and this is certainly a question I want answered -- that led
5 you to be able to answer insofar as you did and how did you
6 get to that point?

7 And I think, you know, that raises a question,
8 well, exactly how did you get there? And that is certainly
9 something the plaintiffs are entitled to know. Then does
10 that lead us anywhere further to answer the question of
11 whether there is more that can be done.

12 **MR. COWAN:** Do you want me to answer that? I'm
13 making notes, if I can certainly answer that now.

14 **THE COURT:** Let me get through 13 and let me see if
15 I have anything else.

16 So then the plaintiffs come up with a proposal,
17 which is what I just asked you an explanation of how you
18 reached the view, both -- I think in the answer to the
19 interrogatory and then more general in the press release that
20 certain things weren't authorized. And if you can't say any
21 more essentially, say so.

22 So those -- I think maybe it's enough to start with
23 13, but those are all to me issues that I don't -- either
24 don't know the answer to or don't really understand.

25 **MR. HOWARD:** May I start then, your Honor, since I

1 think most of those are directed at us?

2 Taking your Honor's interpretation of 13, that it's
3 limited to the answer -- to Paragraph 15 of the answer, that,
4 then, by our reading of Paragraph 15 would then extend to all
5 downloads that they had concluded were inappropriately
6 downloaded.

7 And so the question then is: What are they? And
8 by file, because this is -- this is our basic proof. If we
9 have to prove that downloads were taken inappropriately, and
10 they have identified ones that were, that really goes to the
11 very basic facts of the case.

12 There is then -- we tried to come up with in both
13 13 and 14 some creative ideas for how to cut through this.
14 And the ideas for 13, which sounds like your Honor has picked
15 up on, is say what you did and which forms you can identify,
16 with what specificity you can identify them. And then I
17 think there is one additional step that is a crucial one and
18 it goes to the mapping question, so let me answer it.

19 The other part of our proposal is that they said
20 that they could not identify the impropriety of additional
21 downloads because they -- and the reason is important. It's
22 because they cannot identify the credentials, the customer
23 log-in credentials that were used to download any particular
24 file.

25 If that's true, and it appears to be because they

1 have said it, the mapping information -- which we have
2 provided by the way, but the mapping information is
3 irrelevant, and let me explain why.

4 The point of the mapping is that once you have
5 identified a file, an ESU for example, you need to be able to
6 link that ESU to a particular licensed piece of software.
7 The ESU's have numbers that identify them. And you have to
8 open the ESU in order to see what information it contains and
9 then you have to map, which is where the word comes from,
10 that coding information to a particular piece of software.

11 We have given them the information --

12 **THE COURT:** And for the reason that, then, you know
13 what specific product was downloaded without permission?

14 **MR. HOWARD:** Exactly. Because then you -- once you
15 know what piece of software the ESU correlates to, provided
16 you know the credential, you can then assess was the customer
17 whose credentials was used, were they licensed to that piece
18 of software to which the ESU correlates?

19 **THE COURT:** Okay. And "credential" being what?

20 **MR. HOWARD:** The log-in I.D. So you log in -- at
21 the opening screen of the website you put in an user name and
22 a password, and that user name and password is what I mean
23 by -- is what I'm including in the term "credential."

24 **THE COURT:** So the Oracle system was such that you
25 -- if you had a password and user name, you could log in and

1 then get access to things you weren't entitled to?

2 **MR. HOWARD:** As long as you clicked on the terms of
3 use agreement saying you would not do that, yes.

4 But, yes, you could go in there, and that's so that
5 customers can go in there and find what they want according
6 to the code that applies to their software.

7 So now just circling back to the credential issue,
8 if you don't know what credential was used to take that ESU,
9 it doesn't matter what software it maps to because you can
10 never match it to any particular customer's software. And
11 all we are saying is if that's true, please say so because
12 that is really important information for us to have, that you
13 can't figure it out from your own records because you didn't
14 keep track of the credentials that you used to take the
15 various files that are now sitting on the computers.

16 **THE COURT:** So I'm not -- I think this is the first
17 time you have probably tried to explain it to me. I'm not
18 sure that I understand it.

19 You are saying the customer log-in basically gives
20 a customer access to anything, even though it may have only
21 licensed half of the products that it can then get access to.

22 And if you don't know -- so if you don't know the
23 customer log-in, you can't, therefore, just figure out what
24 it was or wasn't entitled to?

25 **MR. HOWARD:** Right. You can figure out on a

1 customer basis what they're entitled to because you have
2 their license agreements and you know what software.

3 And so for any given ESU on Tomorrow Now system,
4 you know whether Customer A or B was licensed to that
5 software, but what you can't do is know whether that ESU was
6 taken improperly or not because the propriety of the taking
7 is tied to the credential that you use when you logged into
8 the system to download that file.

9 **THE COURT:** Well, the customer's identity.

10 **MR. HOWARD:** Exactly.

11 **THE COURT:** So you are saying if you don't know
12 from which customer you downloaded something, you can't tell
13 whether they had the right to it or not.

14 **MR. HOWARD:** That's what they are saying, that's
15 right. That's what I understand them to be saying in their
16 brief.

17 They say it's technically impossible to identify
18 what customer -- what customer user name and password was
19 used to take any particular downloaded file that is now
20 sitting on their computer systems. And our review of their
21 records and the testimony appears to bear that out. You
22 can't -- you can't go pick a downloaded file on their server
23 and know what credential was used to take that file.

24 **THE COURT:** Okay.

25 **MR. COWAN:** It's a hyper technical distinction that

1 he is making and trying to expand that into the whole mapping
2 issue, and let me explain.

3 Tomorrow Now had records, and we have produced
4 those records, as to what log-in, what customer connection
5 user name and password was given by the customer to Tomorrow
6 Now. And they have obtained testimony indicating -- and a
7 whole chain of records, from email communication from the
8 client giving the password and log-in, the password log-in
9 name, put on the request forms they used to do the downloads.

10 So we do have records of customer names and
11 customer passwords and customer user names being used for
12 specific downloading activity.

13 What we don't have, nor do they have any way to do
14 it either, once a file exists anywhere on our system there is
15 no electronic way, no technical way, there is no tag on that
16 file that says this file was downloaded for that customer.

17 We do know the manner in which the downloads were
18 kept by Tomorrow Now, that they were segregated by customers.
19 When they were downloaded, they were put in separate customer
20 folders and that's where I think some of the show-and-tell
21 may help explain that process and help explain what we are
22 talking about on the issues.

23 So I disagree vehemently with Mr. Howard's
24 suggestion that there is no way to say for a given file --
25 there is no evidence to suggest for a given file what

1 customer's user name and password were used.

2 To the contrary. We have got plenty of documentary
3 evidence. There is just no electronic tag or technical way
4 now to go back and look at those files in the literally
5 millions of files and say for each file which -- for that
6 specific file taken in isolation to have some electronic
7 proof through an electronic tag on the file itself. That was
8 the only point we made in the brief and that point is tied to
9 the mapping issue.

10 If the Court would allow, I think now is probably a
11 good time for me to get into some of the graphics.

12 **THE COURT:** Okay. But let me just -- I do think
13 so, but let me just ask you to make sure I follow on what you
14 said.

15 You are saying, you have a customer request form
16 to download certain things. Okay. You download them. Then
17 the way you would be able to now say you downloaded for
18 Customer A and not for Customer B, this is kept only in
19 Customer A's file.

20 **MR. COWAN:** Correct.

21 **THE COURT:** So you can identify it by seeing whose
22 file it's in.

23 **MR. COWAN:** Correct.

24 **THE COURT:** So I take it by that you are saying you
25 didn't take something Customer A was authorized to get, but

1 Customer B wasn't, and then given to Customer B.

2 **MR. COWAN:** I can't say with certainty that that
3 didn't happen in any instance and I think there has been some
4 evidence that in some instances it did happen.

5 But -- but -- and we can show and we have
6 established in the case that for a large portion of these
7 downloads, they were done on a customer-by-customer basis
8 using that customer's password and log-in and then stored in
9 a separate location. There are groups of downloads that are
10 stored on a non-customer specific basis as well.

11 **MR. HOWARD:** Your Honor, that last point is
12 important and the factual statement that the downloads were
13 segregated by customer is of recent vintage.

14 For many years downloads were downloaded into what
15 they called the master library, where they were not kept
16 according to customer, for JD Edwards or PeopleSoft. And
17 that continued even after SAP acquired Tomorrow Now.

18 Now, it is true that in the last year and a half or
19 so before Oracle sued, there had been a change in policy, but
20 only at that point, that downloads were downloaded into
21 customer specific folders.

22 There was also an effort to dreg up some of those
23 master libraries into couple specific folders. But that
24 doesn't help us because nobody knows whose credentials were
25 used to take those downloads in the first place when they

1 were then assigned into the various customer specific
2 folders.

3 So the customer specific folder fact doesn't answer
4 the question here. There were many downloads that were taken
5 before those were in place and even after they were in place,
6 there were many, many downloads that we know were just put in
7 there that were not taken with that customer's credential.

8 **THE COURT:** Well, if they weren't taken with a
9 customer credential, but then they were assigned to -- they
10 were taken with Customer A's credential and later taken out
11 of the master file and stuck in Customer B's file is what
12 you're saying.

13 **MR. HOWARD:** That's what happened.

14 **THE COURT:** According to what? According to the
15 fact that Couple B was allowed to have them?

16 **MR. HOWARD:** No. They had one criteria for making
17 that decision, and that was the date of the file. So they
18 decided that -- that if the file existed on Oracle's system
19 at a time when Customer B could have downloaded it, then it
20 was okay to copy it over into Customer B's folder even though
21 they did not know and likely had not he ever downloaded it
22 with Customer B's credential at the time that Customer B was
23 licensed to go into the site and download it. So it was
24 purely the date of the file that was the criteria that they
25 used.

1 **MR. COWAN:** But in answer to the Court's question,
2 there was some criteria when they -- because Mr. Howard is
3 correct. There was a period of time when the downloads --
4 you had to separate this between PeopleSoft and JD Edwards
5 because the time is different and the process is sort of a
6 little different.

7 Speaking in general terms where there were master
8 libraries, but JD Edwards, that period was a shorter period
9 of time than PeopleSoft overall. And they did use a process
10 similar to what Mr. Howard just described to try to get
11 downloads in -- copy the downloads into customer specific
12 folders in a way that they thought the customer was permitted
13 to have those downloads by using criteria such as date and --
14 maintenance and dates.

15 But going back to the interrogatory, I think it's
16 very important for the Court to understand the content and
17 the quantity of the files we're talking about. And rather
18 than put something on the screen, I have got all of this in a
19 little booklet that may help us walk through this fairly
20 quickly.

21 **THE COURT:** Okay. Well, you can certainly hand it
22 up.

23 **MR. COWAN:** Okay.

24 (Whereupon, document was tendered
25 to the Court.)

1 **MR. COWAN:** The first page, your Honor, Page 1, is
2 -- you asked about the product verification form and what was
3 that.

4 This is an example, in the JD Edwards situation --
5 and this really goes to interrogatory 13 relative to the
6 inappropriate download comment.

7 You see on this form that's completed with the
8 client's input certain types of applications that they check
9 that they are licensed for and certain types that they are
10 not. The X's indicate those things that they believe they
11 are licensed for. And this is only one piece of one set of
12 products for a particular customer.

13 And this -- if you look over to the left, it's kind
14 of hard to read under "Company Information", but this is for
15 Ocne on Page 1.

16 **THE COURT:** So this is something the customer gave
17 to JD Edwards or the customer gave info and then --

18 **MR. COWAN:** It's a form -- it's a Tomorrow Now form
19 that the customer completed, either by themselves or with the
20 assistance of Tomorrow Now, in trying to determine what the
21 customer was licensed for before the downloading activity
22 occurred.

23 That information then was -- and on Page 2 is an
24 example of the download request form. And, again, these
25 product verification forms have all been produced. To the

1 extent they have been located, they have been produced to
2 Oracle. The download request form, again, have all been
3 produced to the extent they have been located.

4 Here is an example. For Merck, another one of the
5 companies that was named in the original complaint and
6 continues to be named in the current complaint. And it shows
7 the customer connection password and user name, just as I
8 told the Court. It's the third and fourth entry there.

9 But it also references through a series of boxes
10 that are filled out on this form down at the very bottom it
11 says "Electronic Software Updates." And it says that there's
12 two types of releases, Xe and 8.10, which are just the
13 various releases of the product.

14 But four columns over it says "All." And in that
15 instant, even though Merck may not have been licensed for
16 all or represented to Tomorrow Now that it was licensed for
17 all, we know from this form that at least the instructions
18 were to go get all of the ESU's for those two releases, the
19 JD Edwards product.

20 So Page 3 shows where those -- JD Edwards delivered
21 updates and fixes. And the first -- Page 3 shows a screen
22 shot of the highest level folder and page four are the
23 subfolders under that highest level folder, and you see it's
24 divided by customer.

25 And, again, this has all been produced in

1 electronic form to the plaintiffs.

2 And by way of example, about halfway down on this
3 list on Page 4 you see the client Electrolux. If you click
4 on that folder, which is on Page 5, you see that that folder
5 is 4.78 gigabytes in terms of size. It's a sizable folder.

6 And you keep going, Page 6. When you open that up,
7 there's two subfolders. One divided by OneWorld, which is
8 one version of the JD Edwards product, which is a
9 Windows-based solution, and World is another version of the
10 JD Edwards product, which is an old IBM green screen
11 technology product. But you get to page -- that's on Page 6.

12 Page 7, once you click into the OneWorld folder,
13 you see the "Electronic Software Update" subfolder in that.
14 Everything that's downloaded is in this typical file folder
15 structure for the JD Edwards customers after the period of
16 time that Mr. Howard indicated that they were divided.

17 There are a few categories, I think three or four,
18 that still were maintained in a master file basis, but for
19 the most part everything that was downloaded was organized
20 this way after that period of time.

21 Then when you click into the "Electronic Software
22 Update" folder -- and I hate to do this in a painful way, but
23 you see how -- I'm trying to have the Court understand how
24 this is organized electronically and how it's been produced.

25 These are the various versions fourth which

1 Electrolux purportedly indicated they were licensed for. XE
2 is one of those releases or versions of the product. That's
3 on Page 8.

4 And then when you finally get down to the actual
5 ESU's, which is on Page 9, as you see, many, many layers into
6 this folder structure, which are the actual downloaded
7 artifacts, you see circled there there's 5,057. Just for
8 this one customer for that one release there is 5,057 items
9 that were downloaded for that customer.

10 Page 10 gives another example of a specific file
11 that's JD374_exe. And when you open that up, what's inside
12 that is an image of an html file, a web page, if you will.

13 **THE COURT:** What page are you on?

14 **MR. COWAN:** I'm on Page 11 now. And this is the
15 actual description of the ESU itself.

16 And down at that level at the very bottom, the
17 bottom circle on Page 11, you finally have some information
18 in that one download out of the 5,000 that starts to tell you
19 something about how that download relates to the licensed
20 products that Oracle made available for license.

21 **THE COURT:** You are looking at what?

22 **MR. COWAN:** This -- the circle that says "Object
23 B03B0128."

24 **THE COURT:** What does that mean?

25 **MR. COWAN:** I think the second and third character

1 indicate the system code for that particular object, which
2 then tracks back to that product verification form that was
3 on Page 1, for example, "Accounts Receivable."

4 But you see how far into this --

5 **THE COURT:** So you mean the 03 --

6 **MR. COWAN:** The 03 should correspond in the object.

7 Now, that doesn't mean that that particular ESU
8 only relates to that system code. There may be a number of
9 system codes that this particular ESU relates to.

10 And so trying to map these downloads to what the
11 customer was entitled to have, it's a very tedious process.
12 So early on in the case, even before Judge Legge, we wanted
13 to know the answer as much as Oracle did. We went to Judge
14 Legge and we said, "Oracle has to have some electronic
15 mapping information to be able to say for this ESU, this JD
16 384 ESU that we are looking at that's represented on Page 11
17 here, they have to have some electronic way to say, okay,
18 that that ESU is related to these licensed products. And if
19 they give us that data, we can run through electronically all
20 of the files that are on the Tomorrow Now systems tying it
21 back through this folder structure to given customers and
22 tell you which ESUs we have for which customers and make
23 some -- ascertain in a broad way which ones we believe
24 represent these downloads that are -- relate to the licensed
25 products the customer told us they were licensed to and which

1 ones do not.

2 They couldn't give us that. And Tab I of our
3 opposition is the colloquy between me, Judge Legge and
4 Mr. Howard where we talk about this very thing.

5 And the last page of Exhibit I to our opposition,
6 he says I -- oh, I'm sorry. On Page 33 of the transcript,
7 which is the second to the last page of Exhibit I, Judge
8 Legge says, asking to Mr. Howard:

9 "Do you have presently existing any
10 mapping device or program or code which would
11 eliminate the necessity for doing it one by
12 one?"

13 And what he's referring to is not having to go
14 through the process that I've just -- pages and pages that I
15 just walked you through to get down to that little piece in
16 doing it onesey-twosey. We asked some electronic way to do
17 it? And you can read there Mr. Howard's answer to that, "Not
18 that we have been able to generate so far." And he indicates
19 that they had a similar instance.

20 But here is -- and this is in answer to one of your
21 first questions you asked, because Mr. Howard says:

22 "It wasn't our preference to limit the
23 complaint to ESUs for the single system code
24 in them, because we recognize that other ESUs
25 in his view were illegally downloaded, that

1 happened to have more than one system code."

2 But that was after -- in front of Judge Legge when
3 Mr. Howard had explained they actually went through this
4 manual process to identify some specific ESUs that they knew
5 through their logs, because they were watching what Tomorrow
6 Now was doing at a point in time, knew that we had -- that
7 Tomorrow Now had downloaded using a specific customer
8 credential. And then they went back in the complaint and
9 made very, very specific allegations saying you, You
10 downloaded this ESU using this customer's I.D. and that
11 customer's not licensed for that download.

12 We then -- and that was in the first amended
13 complaint. It's the first time they gave that specificity.
14 We, hen, were able to take that ESU. Go look and see if it
15 is, in fact, in that customer's file, and we did. And we
16 were able to compare what that customer told us that they
17 were licensed to, using that information they provided in the
18 complaint, is how the executives reached the conclusion they
19 did that was indicated in the public statements they allude
20 to and the answer.

21 So --

22 **THE COURT:** So you are saying that that answer was
23 based on the allegations in the first amended complaint?

24 **MR. COWAN:** Yes. Because before then we had no
25 way -- we didn't have this mapping information.

1 We knew we had a lot of downloads that Tomorrow Now
2 had downloaded.

3 We knew that at the time they -- what we were
4 saying were located in folders, but we had no way of looking
5 at these files and knowing anything about any of the data in
6 them to be able to map it back. Once they gave us a specific
7 reference, we were able to go back and then trace through the
8 very detailed level at the very minutiae as I have shown the
9 Court to say, yeah, for at least those four it looks like
10 there may be an issue there.

11 We are not conceding liability on that. I don't
12 want any statements I'm making here in the hearing on that.
13 But it certainly is one of those -- before they listed the
14 first amended complaint were some that it appears may relate
15 to products for which the customer told us -- the customer
16 did not indicate they were licensed for. And we said that in
17 the answer. We said that in our discovery responses.

18 But now what they want us to do is to go back and
19 do that for every single download, and I just showed the
20 Court just for this one release for this one customer --
21 there is 5,000 of them. You expand that times 300 customer
22 times multiple releases, the numbers are mind boggling. And
23 this is not a -- nothing that could be done electronically.
24 And Mr. Howard admitted to Judge Legge that it can't be done
25 electronically.

1 **THE COURT:** And you're saying that they could go
2 through exactly the same process as you?

3 **MR. COWAN:** Correct.

4 **THE COURT:** Have you looked at the instances where
5 the customer requested "All" on the request form and had than
6 all of the boxes checked on their authorization?

7 **MR. COWAN:** Well, and that's -- that question
8 presupposes that the customer filled out the download request
9 form. They did not. That was a Tomorrow Now completed form
10 on Page 2.

11 **THE COURT:** Well, but it doesn't really matter who
12 filled it out. In other words --

13 **MR. COWAN:** You are saying on Page 1?

14 **THE COURT:** How many instances -- I'm just looking
15 at what potentially would be more manageable and
16 straightforward, because you would only need to compare two
17 pieces of paper potentially.

18 **MR. COWAN:** But they could do that as easy as we
19 could because it's not going to require us referring to any
20 of our witnesses or any evidence that hasn't already been
21 produced in the case. They can do that analysis as easy as
22 we can. The data is there.

23 **THE COURT:** Has anyone done that analysis?

24 **MR. COWAN:** On our end, not that I'm aware of. I
25 would assume they have either not done it or maybe they have

1 attempted it. I have no idea.

2 **MR. HOWARD:** Your Honor, we haven't done that.
3 What we are talking about right now is whether or not the
4 downloads that were indisputably taken, copied, were
5 appropriately taken, were legally taken or within the scope
6 of a license taken.

7 **THE COURT:** Right.

8 **MR. HOWARD:** That's -- that's their burden. That
9 is their burden because license is an affirmative defense.

10 **THE COURT:** But let them worry about their own
11 burden. If they can't prove their own case, that's too bad.

12 **MR. HOWARD:** Right, but we are certainly
13 entitled -- when they say, "We inappropriately took
14 downloads," we are absolutely entitled to ask, "Which ones?"

15 And the question before the Court is: Are they
16 allowed to rely on 33(d) and refer to all these documents
17 because -- because you can't go through.

18 If the Court is going to interpret the
19 interrogatory as narrowly related to the specific downloads
20 referenced from Paragraph 15 of the answer, then it doesn't
21 seem, based on the explanation that Mr. Cowan just gave,
22 which could very easily be converted into an interrogatory
23 response, which is admissible, that that is burdensome at all
24 to go through and give that answer in the narrative form that
25 you have would get in an admissible interrogatory response.

1 **THE COURT:** Well, just to bite that one last issue
2 off. And what you're saying is they only did it for four?

3 **MR. COWAN:** We did it for -- the four that they
4 identified in the complaint to tie that down. And, of
5 course, we looked broader to see if it was just an isolated
6 issue or not.

7 But in terms of any kind of systematic
8 customer-by-customer trying to get our arms around any
9 specifics, we never did that.

10 **THE COURT:** Well, okay. I mean, I think they are
11 entitled to know the results of what you did and what the
12 results were.

13 **MR. COWAN:** But if that's done, your Honor, by
14 counsel in responding to the complaint, that was another
15 point that we raised in the papers. We are stepping on the
16 side of work product at that point because the question
17 really relates to what did SAP's representative -- what was
18 he referring to when he said it and what's referenced in the
19 answer?

20 And we provided in our answer to interrogatory No.
21 13, which is at Tab C in Mr. Howard's declaration in the
22 original motion, I mean, we told them. The download request
23 forms, you know, for Merck, both say SPX. Metro Machine and
24 Izaki instructed the download team to download all ESUs for
25 all system codes on a particular release level. So we have

1 told them that.

2 **THE COURT:** This is your original response?

3 **MR. COWAN:** That's the original response.

4 **THE COURT:** Well, I don't really -- I'm not very
5 impressed by the work product argument. I just think the
6 facts of what was learned by doing what and then what hasn't
7 been done by implication, you know, is a whole different
8 thing from asking you to do more.

9 And I think the plaintiffs are entitled to know
10 what did you -- what led you to give the answer you did,
11 which is what you just gave in open court, except the part
12 you just added was not fleshed out, which is -- and we looked
13 at some other things, although it wasn't 100 percent.

14 **MR. COWAN:** Right, because we didn't do any kind of
15 systematic analysis because we didn't have --

16 **THE COURT:** Right, but you got -- I mean, I would
17 hope, you kept notes on what you looked at and what you
18 found, that there were these four plus there were some
19 others.

20 **MR. COWAN:** In terms of the process of looking at
21 the product verification forms and looking at the download
22 request forms, just those two documents we can do that for
23 more than just the four I mentioned.

24 But their request goes to a fixed level. That's
25 not getting down to a fixed level. That's just looking at

1 generally did a customer check less than all and then did we
2 download all. And the answer to that is yes, there was some
3 analysis of that. Was it a complete, thorough
4 customer-by-customer analysis? No.

5 But I think what they're -- and I understand what
6 you are saying. You are trying to craft something --

7 **THE COURT:** I'm saying it's not at all burdensome
8 for you to give them what you did find.

9 **MR. COWAN:** Based on?

10 **THE COURT:** That doesn't mean it's 100 percent of
11 what they asked for. It's much less than that, but there is
12 nothing burdensome about giving them that.

13 **MR. COWAN:** Stating the fact of -- well, we would
14 have to go back and do just what you talked about, which is
15 compare those two forms and state what --

16 **THE COURT:** I'm not telling you to do new
17 comparisons.

18 I must say, I find this like swimming in a fog and
19 completely not -- you know, I don't know whether it's
20 inherently something that is not well suited for judicial
21 resolution or what.

22 I feel like we have now spent 40 minutes on this.
23 I'm taking this, you know, one percent of this whole problem
24 which seems very clear to me. Everything else seems
25 completely opaque. And, yet, you keep asking me, Well, what

1 do you mean, why and so forth. Maybe because I'm unclear.
2 But to me it's like, can't we clear this piece of underbrush
3 out of the way.

4 I'm not telling you -- right now I'm not tackling
5 do something new, which is the main thrust of all of this.

6 **MR. COWAN:** If what the Court is asking, do we have
7 any records that we could go refer to of work we did at the
8 time we answered the complaint, to look at that, I think the
9 answer is probably no. Because with the -- you have got to
10 look at all the other things that were going on in the summer
11 of 2007 when we did this.

12 I can tell you that we do have some evidence of
13 some of the stuff we did, but I don't think there's a
14 systematic record of every conclusion we have reached on the
15 fly in doing that analysis.

16 **THE COURT:** Whatever there is, there is.

17 **MR. HOWARD:** Right. And -- but I guess, your
18 Honor, and I apologize for this, it's me being unclear --

19 **THE COURT:** Not obviously, but...

20 **MR. COWAN:** But here is the point. If you were to
21 order us to do that, what I would go back and do is do what
22 you just suggested, which is compare the product verification
23 form, because anything we would have from the '07 time period
24 from a records standpoint is not going to be in a format
25 that's going to yield the kinds of facts you are looking for,

1 because it's the way -- and the reason why I say this, I
2 know. I personally was involved in doing it. I was torched
3 with finding that out.

4 And I know I wasn't focused on documenting what I
5 was doing. I was focused on trying to find the answer to
6 some of these questions, not taking tedious notes along the
7 way of the process.

8 **THE COURT:** So you were just making a qualitative
9 assessment, not specific instances?

10 **MR. COWAN:** Correct, correct.

11 And I don't want to lead the Court and I certainly
12 don't want the record to reflect that we don't have some
13 written indicia of some of this. I'm sure we do, but --

14 **THE COURT:** I think that it may very well be as one
15 of the things that comes out of this hearing you should do
16 what plaintiffs propose; provide an explanation of how you
17 concluded certain downloads were inappropriate, as stated in
18 the press release and to the extent it's stated in the
19 answer, which is not so much inappropriate, but didn't match
20 what the customer representative authorized.

21 **MR. COWAN:** Right.

22 **THE COURT:** And to the extent you can't identify
23 those by problem product, which sounds like you mostly can't
24 but somewhat can, to do that. I don't see anything wrong
25 with that.

1 Now, I'm not asking you to the extent that you
2 can't recall any more and you don't have a record of it,
3 well, then, the answer to that part of that is we don't know,
4 but this is what we do know.

5 In any event, it sounds like that won't get us very
6 far.

7 **MR. COWAN:** It's certainly not going to get down to
8 the file level, because beyond those four that I have
9 referred to they're -- by the complaint, I'm unaware of.

10 **THE COURT:** Well, so far, I mean, from the
11 demonstration at least, it seems those things could be done
12 equally by either party.

13 **MR. HOWARD:** Well, your Honor, I think it's
14 probably right. Each party can unpack an ESU, look at the
15 system code and match it up with a contract.

16 The point of the interrogatory was a little
17 different than that. It was: You have said that there were
18 some inappropriate. What are they?

19 We thought interrogatory also went to the others,
20 and we read in their brief that they said that they can't do
21 it as to the others. And I think that's because they can't
22 link umm up credential.

23 So whether or not the Court orders a statement to
24 that effect as part of a supplemental interrogatory response
25 or whether, I guess, we just serve another discovery response

1 aimed at that question, we can go at it either way, but it is
2 very important to us to have an admissible form that they
3 cannot do that analysis for whatever it is that's outside the
4 boundary of Paragraph 15 and the press release.

5 **THE COURT:** Paragraph 13?

6 **MR. HOWARD:** Paragraph 15 of the answer.

7 **THE COURT:** Okay. Right. Right. Okay.

8 **MR. HOWARD:** And --

9 **THE COURT:** Just a minute.

10 **MR. HOWARD:** Sure.

11 (Brief pause.)

12 **THE COURT:** Well, okay. And your response?

13 **MR. COWAN:** Our response is going to be to the
14 extent we say it, we are going to say something along the
15 lines of what we have already said in the opposition, which
16 is the reason why we can't do it is because we need the data
17 that should be exclusively in their possession.

18 **THE COURT:** Now, okay. Well, that's -- that's
19 fine. But you are allowed to -- I think the interrogatory is
20 proper.

21 But now we have got to get into this thing of
22 whether you told me you did give him the mapping information
23 and you say you didn't. I'm not going to be your trial judge
24 on this. Some people could say...

25 **MR. HOWARD:** This is -- now I feel like I'm in a

1 fog, your Honor, because I think what he just said and what
2 you just said is both sides can do this.

3 I think that -- so it can be done. It's just that
4 they don't want to do it.

5 **THE COURT:** It's very, very burdensome and it's an
6 equal burden for both, which is a legitimate argument under
7 Rule 33.

8 **MR. HOWARD:** Absolutely. And it is, obviously, in
9 available form.

10 But that is very different from saying we haven't
11 given them the mapping information. What he has just done is
12 gone through a long explanation of why they do have the
13 mapping information.

14 We gave them all of the ESUs in this database so
15 that for any given one on their system they could go find it
16 in the database that Oracle keeps for itself. They can look
17 at it. They can see the system code. They can match it to a
18 piece of software. They can match that piece of software to
19 what a customer has licensed.

20 I think the complaint is that there isn't an easy
21 way to do it. I'm sorry, but it's true. There is not an
22 easy way to do that.

23 But if they are going to prove that they had a
24 license to any one of these files, then that is something
25 that they are going to have to do. Nobody has written a

1 program.

2 **THE COURT:** I'm going to take a recess. I feel as
3 if I cannot follow anything anybody is saying. I don't think
4 you have any idea what it's like to be on this side of the
5 bench.

6 I have a 3:00 o'clock meeting that I could postpone
7 a little bit, but not much, about a settlement conference
8 that's tomorrow which I'm co-mediating with a mediator from
9 our ADR unit. The parties have given permission to meet and
10 catch up on what he's done in the first two sessions. He has
11 been away until today. This is the only time I could do it.

12 We have gotten almost nowhere. We haven't even
13 started 14. I think that you -- from my point of view right
14 now, it's -- I cannot decide the mapping issue. I don't
15 understand it any more. I thought I did. I have already
16 forgotten it from half an hour ago because we have moved on
17 to this other side issue where it turned out to be almost a
18 complete waste of time.

19 I mean, this is just not working and I spent a lot
20 of time looking at your papers. I have the impression that
21 it's all very burdensome on both sides. The mapping issue
22 was not -- it wasn't addressed in your reply. I came in here
23 understanding it. Now I'm back to not understanding it.

24 You know, this is just not working. I don't know
25 if you all understand that it's just -- you know, you have

1 been very good in the past and managed to tee things up that
2 more or less I thought somewhat I could decide them, but, you
3 know, right now I'm leaning to only let them answer that
4 interrogatory essentially. Fine. I agree that anything that
5 they are saying they can't do or won't do you should know,
6 have an admissible form and make of it what you will when you
7 come to trial.

8 I get the impression right now that it's equally
9 burdensome on both sides, so I'm inclined to stop there. If
10 there is something further that you are arguing, I don't
11 understand it right now.

12 **MR. HOWARD:** All I was saying, your Honor, is that
13 whatever information we have that would allow you to map, we
14 have given it to them.

15 **THE COURT:** Well, you know, I don't know what to
16 say on the mapping issue. I think it wasn't adequately
17 briefed. Nothing on the reply in it. So I have nothing to
18 add. I'm not prepared.

19 Whether you have given it or not, you know, I'm not
20 going to decide that issue.

21 **MR. COWAN:** But to at least put on cap on. I think
22 where your headed on what additional we need to do on 13, is
23 -- because as I have explained to your Honor, trying to go
24 back and reconstruct what we did in the summer of '07, in my
25 view having been personally involved in it, would be more

1 difficult than simply going through and comparing the product
2 verification forms with the download request forms.

3 If the Court is ordering us to do that --

4 **THE COURT:** Well, I don't know how burdensome that
5 would be and they can do that, too.

6 **MR. COWAN:** I'm not going to say to the Court it's
7 not doable, because it's certainly doable. It's just an
8 issue of the amount of time.

9 At that instance you are talking maybe 300 or 400
10 customers for the forms we do have. That may be something
11 that is doable, but I agree with you and I'm not waiving the
12 argument that it's an equal burden.

13 **THE COURT:** No, I think it's an equal burden. I'm
14 not inclined to ask you to do that.

15 I am still inclined to ask you to do what you can
16 subject to the limits of your records and your memory, which
17 is saying how you came to the conclusion.

18 I think the answer is, We looked at the allegations
19 -- if I understand it, this is probably what the answer is
20 going to be. We looked at the four instances in the
21 complaint and we verified blah, blah, blah. And we looked at
22 some additional instances, and I can or can't remember which
23 ones they were, or this may be some of them, but it may or
24 may not be all of them, and found a similar thing with some
25 others. I mean, that sounds like that's about what you are

1 going to say.

2 **MR. COWAN:** I think so. And your Honor raised the
3 work product issue earlier.

4 I guess if the Court is inclined to give me some
5 guidance on that issue. We certainly don't want to be in a
6 waiver issue where we are divulging everything --

7 **THE COURT:** Well, I don't think -- I don't view
8 that as any waiver and I would -- but I need to hear from the
9 plaintiff.

10 Do you agree that that would not be a waiver of any
11 kind?

12 **MR. HOWARD:** Yes, yes.

13 **THE COURT:** In other words, answer along the lines
14 I just said and that doesn't constitute a waiver for
15 anything.

16 **MR. HOWARD:** That's just reporting facts.

17 **THE COURT:** That's my opinion.

18 **MR. COWAN:** I think that's fine. I just felt we
19 have had all kinds of other privilege issues come up. I
20 don't want to bump up against that line or go over it.

21 **THE COURT:** But he just said that --

22 **MR. COWAN:** Okay, that's fine.

23 **THE COURT:** It's 2:52. Now what?

24 **MR. HOWARD:** We would like a chance to address
25 interrogatory 14.

1 **THE COURT:** Well --

2 **MR. HOWARD:** It doesn't sound like it's productive
3 to continue talking about 13 at this point.

4 **THE COURT:** No. I mean, as far as I can tell, the
5 burden is the same on both of you. And if I were you, I
6 would probably do what I thought would be the most bang for
7 the buck initially, is I would start with where it was a
8 "download all" situation and you knew -- you can glance at
9 this for one second and say, Those are not all. That just
10 happens to be the first two pages you have. There is
11 probably something wrong there.

12 And that's pretty simple, but I think it's equally
13 burdensome on both sides. If you were you, I might pool my
14 money and just hire somebody in India to make that comparison
15 and split the cost. I mean, you both want to know it. I
16 don't know. I think Rule 33 three is appropriate for
17 something like that.

18 **MR. HOWARD:** And I have asked the Court also that
19 there be also included a supplemental response, the same
20 statement they make in their brief; that there is no
21 technical way to tie the credential to the downloaded file.
22 That I think is also equally important.

23 **THE COURT:** No electronic tag. I think that can go
24 in an interrogatory. That's perfectly fine.

25 I do actually think if you got the transcript and

1 it's been represented in open court, that's probably just as
2 good, but I don't think there is any harm in putting it in an
3 interrogatory.

4 **MR. COWAN:** And we don't have -- in particularly in
5 light of how Mr. Howard has argued that point. I think we
6 want to be very explicit in an answer and we certainly would
7 include that in a supplemental answer as to what we meant.

8 **THE COURT:** All right.

9 **MR. HOWARD:** What is your Honor's preference as to
10 interrogatory 14?

11 **THE COURT:** Well, let me look at it again.

12 As I see it, the defendant is saying it's all in
13 the SAS database. Defendant is saying that's user friendly.
14 Your expert Schwentler is saying, Well, it's not a user
15 friendly database. It's very large. And then he draws the
16 conclusion that because it's a non-relational database, it
17 would be easier for someone who knew about the data to
18 understand it.

19 That part I wasn't really sure whether that would
20 be true or not true or what to make of that. Because in
21 other words, all of the predicate parts that's a difficult
22 database don't really push it, push against Rule 33. That's
23 the only nugget in there because maybe one side has an
24 advantage, the other side doesn't.

25 Then there is further the argument that the

1 example of the screen shot, No. 1, it's not representative;
2 and No. 2, even that doesn't go far enough.

3 I mean, I -- then plaintiff also raises the issue
4 about stipulating to the admissibility of facts. You know,
5 that's sort of -- it's in there. There is no -- I don't know
6 what your response is.

7 There are so many issues and, you know, to the
8 extent -- I'm not going to get into the whole opening the
9 door. I don't think there is evidence, reason to require a
10 declaration about what was done to preserve or not preserve,
11 et cetera, et cetera. So I'm not going to order that
12 declaration. So we are just going to focus on 14.

13 And I don't think there is any workable suggestion
14 there either. I mean, some number of hours. Then I'm going
15 to be told, Well, the hours weren't used the way they should
16 have been, or productively or whatever. I mean, I really
17 just don't know what to do.

18 **MR. HOWARD:** Well, we were just trying to come up
19 with some way to reduce the burden, your Honor. And we are
20 open to any other suggestions the Court has.

21 The interrogatory itself, I think -- this is the
22 one that Judge Legge said was definitely relevant, and it
23 goes to again a core liability issue, which is how the
24 environments are being used to cross support customers.

25 There are a couple of concerns we have about SAS

1 that explain why we think it's not appropriate as a Rule
2 33(d) response.

3 And let me just say a sentence about SAS. It's a
4 database that collects data from all kinds of different
5 sources. So the master fix record that you saw is a user
6 created and filled out record. Then that will have attached
7 to it documents that are authored by other people, emails
8 that come in from people. So it collects -- as a database
9 should, it collects all kinds of information from different
10 places. That creates a couple of different problems for a
11 33(d) situation.

12 The first is, it doesn't have necessarily -- unless
13 they agree, which is the point of our proposal on the
14 stipulation, it doesn't necessarily have the same kind of
15 admissible evidence to answer the interrogatory that an
16 interrogatory response would have.

17 To the extent that they are relying on it as a
18 33(d) response and they are willing to agree that when SAS
19 for any particular fix record references an environment, then
20 that is the environment in response to the interrogatory that
21 was used to support the customers who received that fix.

22 That, hopefully, seems like a fairly
23 straightforward proposition. It's what we got out of their
24 opposition and it would go a long way towards, I think, to
25 resolving this problem.

1 **THE COURT:** What's the answer to that?

2 **MR. COWAN:** I think the answer is going to be it
3 depends, because what -- in terms of authenticity, we are not
4 going to have authenticity issues in terms of whether it is
5 the business record of Tomorrow Now, but he is starting to
6 make -- trying to force us through an interrogatory to make
7 qualitative assessments of any particular data point in this
8 database to say if it says it, it is 100 percent true and
9 there is no over evidence that will explain it away. And I
10 don't think that's the province of an interrogatory, to lock
11 someone in to an entire database and say everything in there
12 is what it factually purports to be, from -- and where we
13 don't have any capability of refuting it.

14 And, your Honor, this really all goes back to the
15 whole issue we have been talking about with respect to the
16 stipulation. They say in the reply that defendants are
17 refusing to stipulate. We have not. We sent a proposed
18 stipulation to them about three weeks ago. We haven't heard
19 anything back. They didn't reference that in the reply.

20 But the point is this. There are other vehicles,
21 alternatives in this case, that can possibly be used to
22 accomplish the result that Mr. Howard wants to get out of
23 some of these issues. But trying to force us to take
24 positions about what our data shows and doesn't show we think
25 is inappropriate.

1 It is what it is. They can make whatever arguments
2 they want to make out of it. They can call their own
3 witnesses. Lord knows, they have deposed plenty of ours,
4 300-plus hours, to try to test the accuracy of it. But I'm
5 unaware of any instance where a party has been forced to do
6 what Mr. Howard is suggesting this Court force defendants to
7 do with respect to this data.

8 Back to the 33(d) issue and the balancing the
9 burdens. We have told them, we've said in our opposition.
10 It is highly unlikely on a global basis that there is going
11 to be any witness that has any specific recollection as to
12 all of it. There may be one-off instances where these
13 witnesses will have some recollection here and there, but
14 that is going to be a miniscule exception, I think, to the
15 general rule that unless it's in SAS database, they are not
16 going to have any specific recollection of it. We have told
17 them that. We told them that in the opposition. We have
18 pointed them to it in our answer to the interrogatory.

19 What they are really wanting us to do is prepare a
20 compilation, abstract and summary of the data we have already
21 produced. We think it's inappropriate.

22 **THE COURT:** Well, I think it's inappropriate unless
23 there is anything to -- as I say, it's kind of a one-line
24 thing in the plaintiff's expert's declaration, which
25 generally relates to -- well, it's not really a user-friendly

1 database, but that to a large extent is true of both sides.

2 And the issue would be, is there some reason why
3 it's harder for the defendant than for you? You have the aid
4 of the ex-Tomorrow Now people, who are consultants. Does
5 that help?

6 **MR. COWAN:** It did originally in terms of us trying
7 to understand how to navigate the database, of course; but at
8 this point not really, because at this point I think of
9 lawyer that's involved in the technical side of this case
10 knows how to navigate that database and knows what's in it.

11 Mr. Howard just recited it. Mr. Polito put in a
12 declaration giving you very precise statistics on what their
13 positions were of what that database contained and didn't.
14 He said over 850, I think, of the 1800-plus entries have
15 information about the environment, which is what they are
16 seeking. How is he able to do that if he didn't know how to
17 work the database?

18 He also made -- Mr. Mandya put in a declaration
19 that said only three percent of the data that's in this
20 database matched up to what Mr. Fox said in his declaration.
21 How were they able to do that if they weren't able to
22 understand and remanipulate the data?

23 So it's, in our view, an effort to try to shift not
24 the burden of production, because I think they've, in effect,
25 stipulated to that their through their reply, because they --

1 in making the suggestions of how they lessen it.

2 I think what they are trying to do is shift the
3 burden of proof, and we think that's inappropriate.

4 **MR. HOWARD:** Your Honor, may I respond to a couple
5 of those points?

6 We are not contending that we don't -- we can't at
7 this point navigate SAS. That really isn't the issue. 33(d)
8 is only available if the documents that are referred to
9 through it have the answers to the interrogatory.

10 And I -- my proposal was, agree that where it
11 refers to these environments, that those are the answers to
12 the interrogatory. And Mr. Cowan just said, No, we don't
13 agree to that.

14 So we can navigate to them, but that doesn't get us
15 the admissible evidence that if you are going to use 33(d),
16 the records have to provide.

17 **THE COURT:** Well, I mean, the answer to that -- I
18 can't remember exactly what was answered. Was there a
19 narrative answer to 14?

20 **MR. COWAN:** That I just gave?

21 **THE COURT:** No, in --

22 **MR. COWAN:** Oh, yes, your Honor. It's Tab D to
23 Mr. Howard's declaration, attached to the motion.

24 But we provide both in the initial response and
25 supplemental response the better part of two pages of

1 information. We cite not only the SAS --

2 **THE COURT:** Okay. That's what I'm -- that's what
3 I'm talking about. The point -- I don't have it in front of
4 me.

5 **MR. HOWARD:** I could give you my copy.

6 **THE COURT:** Okay, please.

7 (Whereupon, document was tendered
8 to the Court.)

9 **MR. HOWARD:** Just lines of a narrative.

10 **THE COURT:** There is no editorial. It's the first
11 sentence.

12 **MR. COWAN:** I don't know what page you are looking
13 at, your Honor.

14 **THE COURT:** Page 11.

15 (Brief pause.)

16 **MR. COWAN:** Only one other thought I think I can
17 add to this, your Honor, and it may further frustrate you. I
18 don't know.

19 But I think where Mr. Howard is headed is he's
20 trying to create some inference of the non-existence of data
21 in having us commit to what the non-existence of data means.

22 And in every other case that I have -- I am aware
23 of, generally how that works is you get the data. There is
24 never an instance where a case, particularly of this
25 complexity, you are going to have a data point for everything

1 that happened every day in every instance. You are going to
2 have points of data where the lawyers do what they're trained
3 to do, is take those points of data and build their arguments
4 and present to it a jury and put their best case forward.

5 What they want to do is use the points of data in
6 the white space, the non-data, to create inferences and they
7 want us to commit to what that white space means in this
8 interrogatory, and we think it's improper.

9 **MR. HOWARD:** Your Honor, I really just wanted to
10 know what environments were used to support other customers.

11 And if we are staying with SAS for a moment, and
12 they say it has those answers, then they ought to be able to
13 agree that the environments are in there, supply the answers
14 to that interrogatory.

15 And what I think is the case, is that -- that the
16 reason that they are resisting that is that the answers -- if
17 you look in SAS or if you look at the example they gave and
18 there is a reference to an environment, it requires some
19 interpretation from somebody knowledgeable to know exactly
20 what the implications are of that reference in SAS.

21 I'm not asking the Court to order that they go
22 through every environment, but there's no indication here
23 that they have employed the resource that they did have at
24 all, which are the employees who created SAS and used it and
25 did these activities.

1 It seems to me that there is some requirement at
2 some point that you go to the people and you use them to
3 provide some answer to the question.

4 **MR. COWAN:** And we did that, and we've answered the
5 interrogatory. We found the documents -- not only the
6 database, your Honor, because we are focused on SAS here, but
7 there is the data warehouse that we've spent a lot of time in
8 discovery conferences talking about that has relevant data.
9 There's the backtrack database that we refer to in our
10 opposition. There is custodian emails that has relevant
11 data.

12 And that's my point in not being willing to accept
13 what Mr. Howard is suggesting; that we say yes to SAS as the
14 first and last word, because there may be other points of
15 evidence that both sides have that we would point to to
16 either explain or possibly even contradict what might be in
17 SAS.

18 I'm not suggesting that would be the rule. Quite
19 frankly, I think both sides are going to continue to rely
20 heavily on SAS, both in the prosecution and defense of this
21 case.

22 **THE COURT:** Well, I don't know. It seems to me
23 that what the plaintiff is sort of trying to get out of
24 interrogatory 14 is somewhat of a contention interrogatory.

25 Do you contend that there is any error in SAS? If

1 so -- or do you contend that where SAS mentions an
2 environment, apparently, as downloaded, that it didn't
3 download it. If so, what's your evidence? You are allowed
4 to ask those sort of questions.

5 I guess I'm just going to deny it without
6 prejudice. I really cannot -- I have not been given the
7 tools to know any workable solution whatsoever.

8 I mean, the interrogatory asks for all
9 environments. I'm convinced that that -- and it also --
10 also, I am not convinced that it's more burdensome on the
11 plaintiffs to deal with the database than the defendants.

12 To the extent that there is something that either
13 side is going to contend is wrong in this SAS database or
14 incomplete, you have got all these other discovery devices
15 which you have been using, 30(b)(6), et cetera, of these T.N.
16 employees.

17 If you can identify some specific thing that you
18 want the T.N. employees, ex-employees consulted about, I
19 would probably be open to that, but I just cannot -- I think
20 these kind of -- the whole issue as framed, is 33(d)
21 appropriate for this or not? In general, I'm convinced that
22 it generally is.

23 Where it's failed or isn't adequate I haven't been
24 pointed to the bulk of resolutions.

25 **MR. HOWARD:** We did identify something specific

1 that we would ask the Tomorrow Now employees be asked to do.

2 **THE COURT:** Which is what?

3 **MR. HOWARD:** One of our proposals at the end of our
4 reply was that we take a small number of environments and
5 have them spend, you know, a limited number of time to tell
6 us -- or we can do this on a master fix basis, but to tell us
7 how that was used to support other customers so that we could
8 then use that --

9 **THE COURT:** To support other customers?

10 **MR. HOWARD:** Right. In other words, if you take --
11 you can do this either way. But, say, you did it by the
12 master fix record that they chose to use as their example.
13 You would select -- there's 1887 of those --

14 **THE COURT:** That screen shot is a master fix?

15 **MR. HOWARD:** The master fix.

16 **THE COURT:** Master fix meaning?

17 **MR. HOWARD:** Meaning that the high level generic
18 fix that is created initially and is then sent out to the
19 various customers who are eligible for it.

20 **MR. COWAN:** Even better, the problem -- to think of
21 the master fix to think as the problem --

22 **THE COURT:** The problem that's afflicting various
23 customers?

24 **MR. COWAN:** The problem that is presented that
25 needs to be solved.

1 **MR. HOWARD:** Right.

2 **THE COURT:** For multiple customers.

3 **MR. COWAN:** For multiple customers.

4 And then it has a number of fixes that flow from
5 that master fix or the problem that it ultimately generated
6 to each individual customer that needs that particular
7 problem solved.

8 **MR. HOWARD:** So our proposal was, you know, if you
9 are going to do this on a master fix basis, then you pick a
10 limited number of them and you ask the people who know about
11 them to say using the information that's available in SAS,
12 what environments were used to generate this master fix that
13 was then sent out to different customers. That would answer
14 the interrogatory because you would know, as in the example
15 they put up in their opposition, environment X, Y and Z were
16 used to replicate, develop, test this fix and then the
17 customers got the benefit of that.

18 It's a snapshot of a limited universe, which they
19 can argue is not representative or -- I don't even know how
20 it will come out. Maybe it will come out that half of those
21 have cross use involved in them and half don't, but it gives
22 us something to work with.

23 **MR. COWAN:** I think, your Honor, on that, again,
24 Mr. Howard is trying to bootstrap that remedy into some
25 extrapolation across the universe.

1 **THE COURT:** Well, I haven't reached the
2 extrapolation. He just said you could each argue what you
3 want about whether it's extrapolatable. But what's wrong
4 with doing that?

5 **MR. COWAN:** If we were to do something, I think we
6 would need to do it not an environment basis, to do it on a
7 master fix basis because of the way the --

8 **THE COURT:** Okay. Well, he just offered that, the
9 master fix basis.

10 **MR. COWAN:** And it would need to be a very limited
11 number because it's still a very complicated undertaking.

12 **THE COURT:** So what number?

13 **MR. COWAN:** Five.

14 **THE COURT:** That's kind of what I had in mind. I
15 mean, we can do five. Let Oracle pick which ones they are.
16 Let you keep, you know, some tabs on how long it takes.

17 **MR. COWAN:** Better records than I did in the summer
18 of '07.

19 **THE COURT:** Honest tabs, no inflating, no coffee
20 breaks, et cetera, but, you know... And then, you know, see
21 where that goes.

22 If it really takes a lot of time and yields
23 information that's not very usable and a lot of fudges, it's
24 not going to work, but I wouldn't want to see a lot of
25 fudges.

1 I, in general, on the concept of what you have been
2 arguing is a pretty sort of abstract level, I don't see
3 anything -- I would be loathe to order some kind of
4 far-reaching overall, you know, if you can't refute it, it's
5 deemed admitted type of thing, which is really more like a
6 contention interrogatory or request for admission.

7 But on a specific basis when you're talking about
8 five or six or something, I think it's perfectly reasonable
9 to say, And we have no information at this time and we have
10 looked for it that would contradict it.

11 In other words, the SAS database says -- refers to
12 a certain environment and that normally means that you
13 downloaded it and then gave it to everybody else in the
14 master fix process and there is no information to the
15 contrary. I think it's perfectly reasonable you're stuck
16 with it.

17 Then if you later came up with something to the
18 contrary, it may very well not be admissible, because it
19 would be too late. There would have to be a very good reason
20 why, so --

21 **MR. COWAN:** You mean, for those fixes? For those
22 master fixes?

23 **THE COURT:** Right, right, right, right. In other
24 words, as opposed to some sweeping, you know, everything they
25 say in SAS is right, I think for these five, that would be

1 appropriate.

2 **MR. HOWARD:** Your Honor, that was never my
3 proposal. I never intended to say that it was conclusive or
4 irrebuttable, just that it was admissible.

5 And you always can put in admissible evidence that
6 you think rebuts the other person's admissible evidence, but
7 we have got to have the admissible evidence in the first
8 page.

9 **THE COURT:** Generally speaking, I agree with you
10 about the admissible evidence issue.

11 It's almost 3:15 now and I have somebody waiting
12 for me.

13 **MR. HOWARD:** Sorry, your Honor. The only thing I
14 was going to ask is that there are two product lines,
15 PeopleSoft and JDE, that we be able to do five environments
16 from each so that we have -- because they are completely
17 separate. They are done differently.

18 **MR. COWAN:** It is -- at this point, your Honor,
19 it's just going to increase the amount of time, but if that's
20 what the Court thinks is reasonable, well, we will --

21 **THE COURT:** Unless I get some other basis, it seems
22 not unreasonable.

23 **MR. COWAN:** That's why I didn't refute it.

24 **MR. HOWARD:** We are sorry for keeping you late,
25 your Honor.

1 **THE COURT:** All right. Well, it's just -- you
2 know, I think -- I don't know. I mean, to the extent this
3 was presented as a fight over Rule 33, I just think it wasn't
4 presented -- it just -- I don't know. Somehow that just is
5 not terribly helpful to the Court in the end in helping you
6 to resolve your dispute.

7 I mean, I'm very mindful that anything I do could
8 end up either costing somebody an extreme amount of money and
9 be wasteful, and I don't want to do that.

10 On the other hand, I want everyone to get their
11 legitimate amount of proof on important points.

12 I do think, you know, chasing down every fact is --
13 you know, is pointless and, you know, you will never be able
14 to have a trial long enough to accommodate that.

15 But on the other hand, I don't want, you know, key
16 issues to be hidden. I just -- you know, somehow I think
17 these issues were not at all clear-cut. Maybe that's why you
18 are fighting over them.

19 But given that, maybe that means you better come up
20 with compromises on them yourself, rather than trying to get
21 the Court to come up with one.

22 **MR. COWAN:** I think, your Honor, the last solution
23 that we have ended up with in interrogatory 14 is it makes
24 sense in the same way that those four specific ESUs that were
25 identified in the complaint, that we then could go do some

1 specific response to, we had to under the federal rules to
2 admit or deny those allegations.

3 And so I see a parallel between that and what you
4 just discussed --

5 **THE COURT:** Well, somewhat. But, I mean, there's
6 also the point -- I do think in general making the database
7 available to both sides, educating the other side -- i.e.
8 Oracle in this case -- sufficiently that they can manipulate
9 it, that is the legitimate way to conduct discovery.

10 And generally speaking, as I've said, I think in
11 general I was more persuaded by defendant that Rule 33 did
12 apply, but I'm trying to see where might it be, you know, a
13 question of you need that plus something, you know.

14 But I think when we are in this arena of extremely
15 complicated very expensive, very technical discovery it -- it
16 just doesn't work to sort of prevent it. Is it a Rule 33 or
17 isn't it? It's not really -- somehow it doesn't seem to fit
18 very well to a practical solution.

19 **MR. HOWARD:** We will try and come up with a
20 different way. That was the objection they made, so we were
21 trying to cut through that.

22 **THE COURT:** I understand. I'm not really faulting
23 the parties. I guess I'm grappling with, you know, sort of
24 how does the Court, federal procedure catch up with these
25 problems? Because as you can see, I try very hard to come up

1 with practical solutions as opposed to, you know, very
2 theoretical technical arguments, which I don't -- I think
3 could end up being both unjust and enormously expensive.
4 That's what worries me.

5 So I don't know what more to say. I'm not
6 necessarily faulting either party. I'm just saying somehow
7 this is a very frustrating exercise.

8 **MR. HOWARD:** We understand, your Honor. I guess
9 all I can say is that I think both sides would agree there
10 was a fair amount of frustration to get to this point, and we
11 have been able to sort out a lot of these complicated
12 disputes.

13 From our perspective this is -- these were two that
14 went to really core liability issues where as long as SAS is
15 admissible, as long as the environment information, SAS, is
16 admissible I think we can work with that. The concern is
17 over admissible evidence.

18 **THE COURT:** To that extent I think, you know, why
19 don't you -- and I'm sure the judge will make you do it if
20 you don't do it now, Judge Hamilton.

21 I think you should be able to -- I don't know
22 exactly what issues. But, I mean, generally speaking
23 anything from SAS ought to be admissible. The question is,
24 then, what do you take from it?

25 **MR. COWAN:** I don't think there is going to be any

1 major disputes on authenticity, that it is what it says it
2 is.

3 **THE COURT:** It's a business record, so it's not
4 hearsay.

5 **MR. COWAN:** I don't think there is going to be any
6 issue on that. They have used it extensively in depositions,
7 et cetera. I don't foresee that being a problem unless there
8 is some particular piece of it or component that has similar
9 liability issue, et cetera. I don't think that's going to be
10 the big issue. I do agree that's something we take up with
11 the trial judge at trial if --

12 **THE COURT:** Well, I mean, there is no reason not to
13 take it up now to some extent. I mean, I don't know if you
14 have some particular concern.

15 Anyway, I have to stop. It's been an hour and 20
16 minutes.

17 **MR. HOWARD:** We may make a further proposal in a
18 discovery conference in that regard.

19 **THE COURT:** I'm not opposed to that. I don't think
20 you can leave everything to the last minute.

21 **MR. COWAN:** I understand. But my only point on
22 that, your Honor, without knowing what his proposed agreement
23 is and trying to agree with something on the fly, I'm
24 hesitant not to commit.

25 **THE COURT:** I'm not asking you to commit to

1 anything right this minute.

2 MR. COWAN: Okay.

3 THE COURT: I do think to the extent this was about
4 admissibility, I think you ought to address that directly by
5 stipulation.

6 MR. COWAN: I don't expect any major barriers
7 there.

8 MR. HOWARD: Thank you, your Honor.

9 THE COURT: All right. Thank you. I guess I will
10 ask both of you to prepare an order.

11 MR. COWAN: Okay.

12 THE COURT: I guess your motion --

13 MR. HOWARD: Why don't we prepare it and send it to
14 them, your Honor?

15 MR. COWAN: That's fine. Thank you, your Honor.

16
17 (Whereupon, further proceedings in the
18 above matter were adjourned.)
19

20 --oo--
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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 07-1658 PJH (EDL), ORACLE CORPORATION versus SAP AG, et al were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, August 5, 2009